

SEP 23 2004

FCC - MAILROOM

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
FM Table of Allotments, FM Broadcast Stations
(Ft. Collins, Westcliffe and Wheat Ridge, Colorado)

MB Docket No. 03-57
RM-10565

TO: Full Commission

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

Meadowlark Group, Inc. (hereinafter "MGI"), by its attorney, hereby respectfully replies to the Opposition to Application for Review filed in this proceeding by Jacor Broadcasting of Colorado, Inc. (hereinafter "Jacor"), on September 14, 2004. In reply thereto, it is alleged:

1. In its Opposition, Jacor simply repeated the mantra that MGI's counterproposal was contingent upon the rulemaking and was, therefore, properly dismissed. On page 4 of its Opposition, Jacor discusses the underlying *Memorandum Opinion and Order* (which it erroneously refers to as a "Report and Order"), as follows:

"The Bureau properly denied Meadowlark's Petition for Reconsideration and Motion to Consolidate in the *Report and Order*. The Bureau explained: 'the Commission specifically stated that a notice of proposed rule making will only be issued after the reclassification issue has been resolved. This is necessary to avoid the disruption of the efficient and orderly processing of rulemaking proposals by avoiding delays and uncertainties for the parties because the ultimate status of the Class C station is not yet known. For this reason, the reclassification procedure is not available to the party filing the counterproposal.' The Bureau further stated, 'we will not consider the Meadowlark Counterproposal in this proceeding because it is not an acceptable *bona fide* proposal entitled to comparative consideration because Jacor Broadcasting has filed the requisite application to maintain

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Station KFRX's existing protection as a Class C station.”
[Footnotes omitted].

These contentions, which form the heart of the staff decision, are fundamentally and numerously flawed.

2. In the first place, while the proceedings pertaining to the reclassification of KFRX may have started as a rulemaking proceeding,¹ they changed to an application proceeding when Jacor decided to resist reclassification by filing an application. That application was filed even before MGI filed its Counterproposal to allocate a new channel to Creede, Colorado. With the filing of the application, the rulemaking became moot, and the only question remaining is whether to grant the application as a full Class C facility, or not.²

3. Furthermore, because Jacor has filed an application, there are no longer any “uncertainties,” such as those cited by the staff. Jacor’s proposal is precisely known. To the extent that its application seeks the grant of a full Class C facility, the application is defective because the application does not calculate HAAT in the manner prescribed by the Rules. If the application is granted, and HAAT is calculated in the manner prescribed by the Rules, the allotment at Creede, proposed by MGI, can also be granted. If the Rules are waived and the application is granted as a full Class C facility, the Creede allotment must be denied – a result clearly contrary to the public interest. Either way, however, all that is required is a simple decision, based upon known facts; there are no “uncertainties.”

¹ See, *Reclassification of License of Station KFRX, Denver, Colorado*, 18 FCC Rcd 3220 (MB 2003) and Jacor’s subsequent application (File No. BPH-20030424AAO), which purports to specify full Class C facilities for Station KFRX.

² *Jacor argues, quite correctly, that reclassification of a station such as KFRX to a lower class, can only be accomplished through the filing of a petition for rule making, and not through the filing of a counterproposal. Jacor forgets that the reclassification of KFRX did, in fact, result from the filing of a petition for rule making, initiated by Akron Broadcasting Company.*

4. Finally, there is the issue of delay. That issue cuts against the procedure followed by the staff. The staff dismissed MGI's Counterproposal, pointing out that if the Jacor application is denied, MGI would be at liberty again to file its Counterproposal as a Petition for Rulemaking. But prompt action on the application, which the staff has demonstrated is possible in some cases, would have eliminated any delay.

5. At the very least, this procedure means that the Creede allotment will be delayed. The citizens of Creede, Colorado, however, have a need for a first local broadcast service sooner rather than later. Similarly, the people who will receive a first or second reception service from the Creede station have a need for first or second reception service sooner rather than later. The taxpayers, who will benefit from the sale of the Creede license, have a need for the money sooner rather than later.

6. Most troubling is that if the Commission affirms the staff's decision, class C licensees facing reclassification will simply file defective applications and request waivers to temporarily defeat bona fide requests pursuant to *Streamlining*.³ The result will be more delay and uncertainty.

7. In short, the procedure followed by the staff, and supported by Jacor, creates the very sort of delays which were the subject of the staff's apprehension in the *Memorandum Opinion and Order*. Moreover, it actually creates uncertainty where none existed. The staff decision must, therefore, be reversed.

³ *Streamlining of Radio Technical Rules, 15 FCC Red 21,649 (2000).*

September 22, 2004

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kelli A. Muskett, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via first class, U.S. mail, postage prepaid, this 22nd day of September, 2004, to the offices of the following:

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